UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BRADLEY BOWEN,	)	
	)	
PETITIONER	)	
	)	
v.	)	**CRIMINAL NO. 95-21-B-H**
	)	
UNITED STATES OF AMERICA	)	
	)	
RESPONDENT	)	

MEMORANDUM DECISION AND ORDER ON PETITIONER'S MOTION UNDER 28 U.S.C. § 2255 AND MOTION TO MODIFY TERM OF IMPRISONMENT

Bradley Bowen has taken three appeals of his conviction and sentence, and has been successful in obtaining a substantial reduction in his sentence based upon an ambiguity in earlier Guideline definitions of the term "hashish oil." He now brings a collateral attack under 28 U.S.C.A. § 2255 and a so-called motion to modify terms of imprisonment. He presents six basic issues: (1) that his indictment, conviction and sentencing in 1995-1997 are contrary to Apprendi v. New Jersey, 530 U.S. 466 (2000), and subsequent Guideline amendments reflecting Apprendi; (2) that the definition of hashish oil was unconstitutionally vague, thereby rendering the indictment "fundamentally defective" and depriving this court of subject matter jurisdiction; (3) that the indictment was defective because it failed to demonstrate "cause" for the charges against him—apparently based on some belief that an adequate number of grand jurors did not concur in

the indictment; (4) that the drug quantity on which he was sentenced was inaccurate because it included the weight of containers or otherwise double counted; (5) that he suffered ineffective assistance of counsel in the failure to object to the conspiracy jury instructions; and (6) that amendments to 21 U.S.C.A. § 841 were null and void and/or ex post facto as applied to him.

APPRENDI AND GUIDELINES

The Court of Appeals for the First Circuit has stated broadly that Apprendi is not retroactive to cases on collateral review, Sustache-Rivera v. United States, 221 F.3d 8, 15 (1st Cir. 2000), citing a Fourth Circuit decision for the proposition that a new rule like Apprendi is retroactive "only when the Supreme Court declares the collateral availability of the rule in question, either by explicitly so stating or by applying the rule in a collateral proceeding."[1] (Citations omitted). Virtually all other Circuits that have ruled on the issue agree. See Browning v. United States, ___ F.3d ___, 2001 WL 202041, at *4-5 (10th Cir. Mar. 1, 2001); Jones v. M.D.L. Smith, 231 F.3d 1227, 1238 (9th Cir. 2001); Talbott v. Indiana, 226 F.3d 866, 869 (7th Cir. 2000); In re Joshua, 224 F.3d 1281, 1282-83 (11th Cir. 2000).[2] This is a collateral attack under section 2255, and Bowen therefore cannot

[1] Sustache-Rivera actually speaks of Jones v. United States, 526 U.S. 227, 251 (1999), which preceded Apprendi, but a footnote reveals that it treats them the same. See 221 F.3d at 15 n.12

[2] The Eighth Circuit has said (in the absence of any contrary argument by the Government), that Apprendi may be retroactively applicable in a *first* section 2255 petition (filed instead of a direct appeal) "shortly after" (and therefore presumably within section 2255's one-year limitations period following) the final judgment in the underlying case. United States v. Nicholson, 231 F.3d 445, 454 (8th Cir. 2000); United States v. Rodgers, 229 F.3d 704, 705 (8th Cir. 2000); but see Jones, 231 F.3d at 1237-38 (declining to apply Apprendi rule to initial collateral attack using Teague v. Lane, 489 U.S. 288 (1989), standard); Talbott, 226 F.3d at 869 (warning prisoners to reconsider bringing initial *(continued on next page)*

pursue his Apprendi challenge.

Alternatively, Bowen mounts a guideline challenge under Amendment 591, effective November 1, 2000. United States Sentencing Commission, Guidelines Manual, Amend. 591 (Nov. 1, 2000). But amendment 591 has nothing to do with Bowen's case. Amendment 591 resolves a circuit split regarding enhanced penalties for drug offenses in protected areas or involving underage and pregnant individuals. These factors are not present in Bowen's case. As a result, Bowen's Guideline challenge fails as well.

SUBJECT MATTER JURISDICTION

Bowen never moved to dismiss the indictment. He has taken three appeals to the Circuit Court of Appeals. He even challenged the definition of "hashish oil" and succeeded in persuading the Court of Appeals that it was too ambiguous to sustain the harsher sentence and, under a rule of lenity, had his sentence reduced to what it would have been for ordinary marijuana. See United States v. Bowen, 127 F.3d 9, 14 (1st Cir. 1997). He is therefore unable to show cause for his failure to raise this subject matter jurisdiction challenge earlier, and that is fatal. Suveges v. United States, 7 F.3d 6, 10 (1st Cir. 1993); see also Prou v. United States, 199 F.3d 37, 46-47 (1st Cir. 1999). (He also cannot show prejudice, since he was sentenced at the minimum for marijuana.)

collateral attacks based on Apprendi).

DEFECTIVE INDICTMENT

This claim fails for several reasons. First, Bowen has provided no sworn basis for his suspicion of irregularity in the grand proceedings; second, on December 15, 1995, he withdrew a motion challenging the grand jury proceedings, thereby affirmatively waiving any such issue. See United States v. Barbato, 471 F.2d 918, 921 (1st Cir. 1973) (waiver of defect in indictment if not raised before trial). Third, there is a presumption of regularity, see In re Grand Jury Proceedings, 814 F.2d 61, 71 (1st Cir. 1987), and Bowen has provided no basis for overcoming it.

DRUG QUANTITY

The First Circuit has already held that any challenge to drug quantity was waived at the re-sentencing. United States v. Ticchiarelli, 171 F.3d 24, 30 (1st Cir. 1999). That ends the matter. Singleton v. United States, 26 F.3d 233, 240 (1st Cir. 1994).

INEFFECTIVE ASSISTANCE OF COUNSEL / JURY INSTRUCTIONS

Bowen seems to think that the jury conspiracy charge was based on 18 U.S.C.A. § 371, rather than 21 U.S.C.A. § 846. The short answer is that Bowen is simply wrong. The only difference between the two is section 371's requirement of an overt act. Compare 18 U.S.C.A. § 371 (West 2000) with 21 U.S.C.A. § 846 (West 1999). The jury here was never told that an overt act was required. The jury instructions were correct, and there was nothing for counsel to object to. Bowen fails both parts of the Strickland test. Strickland v. Washington, 466 U.S. 668, 687

(1984) (holding that in order to show that counsel's assistance was defective, defendant must show that performance was deficient and this deficiency prejudiced the defense).

COMPREHENSIVE CRIME CONTROL ACT

Bowen says that Pub. L. 98-473 attempted to amend the drug laws, but was vetoed by President Reagan. Supp. Mem. of Pt. & Authorities in Support of Mot. to Vacate Sentence of a Person in Fed. Custody Pursuant to 28 U.S.C. § 2255 at 21. Later, he says, Congress passed legislation as part of an appropriations bill that followed a 42-point proposal that President Reagan gave Congress. Id. at 22. It is difficult to understand the argument, but it seems to be that somehow this procedure was an unconstitutional way around the earlier veto; that it was inappropriate to have the statutory amendment in an appropriations bill; and that some deficiency results from the date of completion of the budget that year. Assuming there is any substance to any of these arguments,[3] Bowen shows no cause for failing to raise them earlier. Moreover, all of this activity occurred by 1987, taking Bowen's legislative history as accurate. The indictment charged

[3] Bowen cites Tennessee Valley Authority v. Hill, 437 U.S. 153, 190 (1978), for the proposition that Congress cannot use an appropriations bill to change already existing laws. This interpretation of Hill is not entirely accurate. The Supreme Court in Hill held that appropriations measures that repeal by implication substantive laws cannot stand; an intent to repeal must be clear and manifest. 437 U.S. at 189. If it makes its intent manifest, however, Congress is not prevented from amending a statute in an appropriations bill. See Robertson v. Seattle Audubon Society, 503 U.S. 429, 440 (1992) (holding that "Congress may amend substantive law in an appropriations statute as long as it does so clearly"); United States v. Will, 449 U.S. 200, 222 (1980) (same). The legislative history to Pub. L. 98-473 clearly states that it amends the drug laws, 21 U.S.C.A. § 841(b) and 21 U.S.C.A. § 962. See S. Rep. No. 98-225 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3437-40 (noting that "section 502 amends 21 U.S.C. 841(b)").

Bowen with conduct in 1994 and 1995. There is therefore no ground to challenge that it is *ex post facto* as applied to Bowen. See Carmell v. Texas, 529 U.S. 513, 519 (2000) (holding that there was no *ex post facto* claim where uncontested assault counts were committed after law went into effect).

CONCLUSION

The government's objection to the Magistrate Judge's decision granting the motion to amend the petition is **SUSTAINED**; the motion to amend is **DENIED**; the section 2255 motion is **DENIED**; and the motion to modify term of imprisonment is **DENIED**.

Because the issues raised are frivolous, a certificate of appealability is also **DENIED**.

SO ORDERED.

DATED THIS 16TH DAY OF MARCH, 2001.

_____

D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

U.S. District Court
District of Maine (Bangor)
Criminal Docket For Case #: 95-CR-21-04

BRADLEY OLIVER BOWEN
defendant

BRADLEY OLIVER BOWEN
Pro Se
FED. NO. 44342-004
2680 HIGHWAY 301 SOUTH
JESUP, GA 31599

U.S. ATTORNEYS:

MARGARET D. MCGAUGHEY
ASSISTANT U.S. ATTORNEY
OFFICE OF THE U.S. ATTORNEY
P.O. BOX 9718
PORTLAND, ME 04104-5018
(207) 780-3257

JAMES M. MOORE
ASSISTANT U.S. ATTORNEY
OFFICE OF THE U.S. ATTORNEY
P.O. BOX 2460
BANGOR, ME 04402-2460
(207) 945-0344